

FEDERATION OF REGULATORY COUNSEL, INC.

SURPLUS LINES REGULATION IN FLORIDA â PART II

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Opinions issued by the Florida Supreme Court and the Eleventh Circuit Court of Appeals in late 2008 created ambiguity regarding the scope of regulation of surplus lines insurers in Florida, particularly in the area of policy form and rate approval. Historically, surplus lines insurers writing such policies in Florida have not been subject to policy form and rate regulation applicable to authorized insurers under Chapter 627, Florida Statutes. In response to these opinions and the uncertainty created by them concerning Florida's limited regulatory role in relation to surplus lines insurers and their policies, the Florida Legislature passed Committee Substitute for House Bill 853 (2009) ("CS for HB 853") to clarify that insurance policies issued pursuant to Florida's Surplus Lines Law¹ are exempt from the requirements of Chapter 627.

I. Discussion of Florida Case Law Creating Ambiguity in Regulation of Surplus Lines Insurance²

The Florida Supreme Court in *Essex v. Zota*, 985 So. 2d 1036 (Fla. 2008), decided a certified question from the United States Court of Appeals for the Eleventh Circuit concerning the interpretation of Florida law requiring delivery of a copy of the insurance policy to the insured.³ In holding that the delivery of the surplus lines insurance policy to the insurance broker was sufficient under Florida law, the Court analyzed the legislative history of several provisions within Chapter 627, Florida Statutes, including section 627.021(2), which exempted surplus lines insurers from certain requirements applicable to admitted carriers.⁴ Applying rules of statutory construction, the Court determined that section 627.021(2)'s exemption for surplus lines insurers applied only to Part I of Chapter 627, which deals with rates and rating organizations.⁵ Therefore, the Court held that surplus lines insurers are subject to all other parts of Chapter 627, including policy form regulation that admitted carriers must comply with - a significant departure from the limited regulation of surplus lines insurers and their policy forms in Florida for at least the past twenty years. Shortly thereafter, the Eleventh Circuit Court of Appeals issued its opinion in *CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Company*, 291 Fed. Appx. 220, 2008 WL 3823898 (11th Cir. 2008), finding that policy form review and approval requirements applicable to authorized insurers under section 627.410, Florida Statutes, applied to surplus lines insurance based upon *Essex*.⁶

II. Legislative Action in Response to Essex and CNL Opinions

During the 2009 Regular Session of the Florida Legislature,⁷ CS for HB 853 was passed to exempt surplus lines insurers from Chapter 627,⁸ and impose certain requirements on surplus lines insurers that admitted insurers must comply with ⁹ or that the Florida state and federal courts have determined also apply to surplus lines insurers. ¹⁰ CS for HB 853 has been enrolled and sent to Florida's governor for signature.¹¹ Every bill passed by the Florida Legislature must be presented to the governor for approval and shall become a law if the Governor approves and signs it, or fails to veto it within seven consecutive days after presentation.¹²

The provisions of this bill and potential impacts are discussed in further detail below:

A. Retroactive Exemption for Surplus Lines Insurers from Chapter 627 and Severability Clause

CS for HB 853 amends section 626.913, Florida Statutes, to expressly state that the provisions of Chapter 627 do not apply to surplus lines insurance authorized under Florida's Surplus Lines Law except as may be

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specifically stated.¹³ The exemption is remedial and operates retroactively from October 1, 1988, which is the effective date of section 627.012.¹⁴ ¹⁵ However, lawsuits filed on or before May 15, 2009 are not subject to the October 1, 1988 retroactive date.¹⁶

This retroactive exemption of surplus lines from Chapter 627 conforms to Florida Statutes and Florida case law concerning retroactive application of statutes. Section 624.21, Florida Statutes, requires amendments to the Florida Insurance Code to operate prospectively, unless a contrary legislative intent is specified, which CS for HB 853 does. CS for HB 853's specific language regarding its remedial nature and non-application to suits filed before or on May 15, 2009, is designed to ensure that due process of asserted substantive rights is not adversely affected or abolished.¹⁷ Finally, CS for HB 853 includes a severability clause ¹⁸ to cure any possible constitutional encroachment resulting from CS for HB 853 or its application. It and the corresponding judicial doctrine of severability are designed to: 1) recognize the obligation of the judiciary to uphold the constitutionality of legislative enactments where possible and to strike only the unconstitutional portions; and, 2) to show great deference to the legislative prerogative to enact laws.¹⁹

B. Notice and Disclosure Requirements

Section 626.924, Florida Statutes, was amended to require surplus lines policies issued on or after October 1, 2009 to have stamped or printed on the face of the policy the following notice in at least 14-point, boldface type:

**SURPLUS LINES INSURERS' POLICY RATES AND FORMS ARE NOT APPROVED BY ANY
FLORIDA REGULATORY AGENCY.²⁰**

Section 626.9371 was created to establish requirements for payment of premiums and claims for surplus lines insurance contracts issued on or after October 1, 2009 in Florida or covering risks located in Florida. This provision is substantially similar to existing section 627.4035 on the same subject; however, unlike section 627.4035, section 626.9371 does not impose premium payment plan options or approval requirements of such plans for personal and commercial residential property policies.²¹

Section 626.0372, Florida Statutes, was created to establish disclosure statements for certain information concerning liability coverage under surplus lines policies issued on or after October 1, 2009. Section 626.0372 is substantially similar to existing section 627.4137 on the same subject. The disclosure statement information to be provided under section 626.0372 is the same as section 627.4137:

- (a) the name of the insurer;
- (b) the name of each insured;
- (c) the limits of the liability coverage;
- (d) a statement of any policy or coverage defense that such insurer reasonably believes is available to such insurer at the time of filing such statement; and;
- (e) a copy of the policy.²²

However, section 626.0372 does not enact the same response and amendment periods imposed by section 627.4137. ²³ Instead, section 626.0372 establishes a sixty day period for surplus lines insurers to comply with a claimant's request for information or amend any prior disclosures upon discovery of facts meriting such an amendment. ²⁴

Section 626.9373, Florida Statutes, was created to impose attorneys' fees penalties against surplus lines insurers upon entry of a judgment or decree by a Florida court against a surplus lines insurer under a policy or contract executed by the insurer on or after the effective date of CS for HB 853. It is similar to section 627.428(2) and (3)²⁵ ²⁶ and states in pertinent part:

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(1) Upon the rendition of a judgment or decree by any court of this state against a surplus lines insurer in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer on or after the effective date of this act, the trial court or, if the insured or beneficiary prevails on appeal, the appellate court, shall adjudge or decree against the insurer in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the lawsuit for which recovery is awarded.

2) If awarded, attorney's fees or compensation shall be included in the judgment or decree rendered in the case.

Finally, Section 626.9374, Florida Statutes, was created to impose disclosure requirements concerning hurricane or wind deductible and coinsurance provisions within surplus lines policies insuring personal lines residential property insurance policies after October 1, 2009.²⁷ These disclosures must appear on the face of the policy and be in at least 14-point boldface type.²⁸ These notice disclosure requirements are similar to those applying to admitted carriers under section 627.701(4)(a). However, it is significant that section 626.9374 specifically refers to "hurricane or wind losses" and section 627.701(4)(a) only refers to "hurricane losses."²⁹ Section 626.9374's reference to "wind losses" implies that any surplus lines policies insuring against any wind loss, including one not associated with a hurricane, would be required to have the 14-point boldface type disclosure. This interpretation is reasonable given: 1) the Legislature's amendments to section 627.701 to transition personal residential and commercial residential property insurance policies providing windstorm deductibles and coinsurance based on wind losses to higher hurricane deductibles and coinsurance based on hurricane losses;³⁰ and, 2) the Florida Office of Insurance Regulation's distinction between windstorm events associated with hurricanes and windstorm events not associated with hurricanes as evidenced by its directive to residential property to use the "all other perils" or "other than hurricane" deductibles following Tropical Storm Fay in 2008.³¹

III. Conclusion

Surplus lines insurers should carefully examine Chapter 627, Florida Statutes to determine which, if any provisions specifically refer to surplus lines insurers or surplus lines insurance to determine the specific statutes within Chapter 627 that are applicable and the extent of such application in light of CS for HB 853's exemption language. Moreover, the new disclosure requirements are different from those required under Chapter 627 and should be carefully examined.

Endnotes

1. §§626.913 - 626.937, Fla. Stat. constitute and are referred to as the "Surplus Lines Law." *See* §626.913, Fla. Stat.
2. *See also* "Florida State and Federal Courts Impose Policy Form Review and Approval Requirements on Surplus Lines Insurers," FORC Journal: Volume 20, Edition 1, Spring 2009.
3. The certified question answered by the Florida Supreme Court in *Zota* was "[w]hether Fla. Stat. § 626.922 or § 627.421, or both, require delivery of evidence of insurance directly to the insured, so that delivery to the insured's agent is insufficient."
4. "[T]his Court has previously held that-under a full statutory analysis-section 627.021(2) applies exclusively to part I of chapter 627. *Essex*, 985 So. 2d at 1042 *citing Nat'l Corporacion Venezolana, S.A. v.*

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- M/V Manure V*, 511 So. 2d 968, 970-71 (Fla.1987); §§ 627.011-627.381, Fla. Stat. (2003) (Part I of Chapter 627).
5. *Essex*, 985 So. 2d at 1043.
 6. 291 Fed. Appx. at 225.
 7. The 2009 Florida Legislature convened on March 3, 2009. *See* Article III, §3(b), Fla. Const.
 8. *See Lowry v. Parole and Probation Comm'n*, 473 So. 2d 1248, 1250 (Fla.1985) (where "an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof."
 9. Fla. H.R. Government Policy Counsel, CS for HB 853 (2009), Staff Analysis (April 21, 2009) at 8.
 10. *See Underwriters at Lloyd's London v. Osting-Schwinn*, 545 F.Supp 2d 1261 (M.D. Fla. 2008) (applying section 627.4137, Fla. Stat. to surplus lines); *All Underwriters v. Weisberg*, F.3d 1309 (11th Cir. (Fla.) 2000) (applying section 627.428 to a marine insurance dispute on a surplus lines marine insurance policy); *Essex*, 985 So. 2d at 1050 (indicating that the federal courts remain free to impose an award of attorney's fees under section 627.428 in favor of defendants should they ultimately prevail against Essex); *Chacin v. Generali Assicurazioni Generali SPA*, 655 So. 2d 1162 (Fla. 3d DCA 1995).
 11. *See* §11.07, Fla. Stat. requiring that all bills and joint resolutions passed by the Senate and House of Representatives must be enrolled on paper by the Secretary of the Senate or the Clerk of the House of Representatives, accordingly as the bills or joint resolutions may have originated in the Senate or House of Representatives, before they are presented to the Governor or filed in the Department of State.
 12. *See* Article III, §8, Fla. Const.
 13. §1, CS for HB 853, Eng. 1 (2009).
 14. §7, CS for HB 853, Eng. 1 (2009).
 15. Fla. H.R. Government Policy Counsel, CS for HB 853 (2009), Staff Analysis (April 21, 2009) at 4.
 16. §7, CS for HB 853, Eng. 1 (2009).
 17. *See Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla.1996). When a law affects substantive rights, liabilities, rights and duties, the law is presumed to apply prospectively. *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499 (Fla.1999). The policy rationale underlying this presumption is that "the retroactive operation of statutes can be harsh and implicate due process concerns." *Id.* For this reason, if a statute operates retrospectively, the courts will not apply it to pending cases absent clear legislative intent. *Id.*
 18. §8 CS for HB 853, Eng. 1 (2009).
 19. *See Lawnwood Medical Center, Inc. v. Seeger*, 990 So. 2d 503 (Fla.2008); *Ray v. Mortham*, 742 So.2d 1276 (Fla.1999).
 20. §2, CS for HB 853, Eng. 1 (2009).

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21. §627.4035(1), Fla. Stat. states in pertinent part: "(1) The premiums for insurance contracts issued in this state or covering risk located in this state shall be paid in cash consisting of coins, currency, checks, or money orders or by using a debit card, credit card, automatic electronic funds transfer, or payroll deduction plan. **By July 1, 2007, insurers issuing personal lines residential and commercial property policies shall provide a premium payment plan option to their policyholders which allows for a minimum of quarterly and semiannual payment of premiums. Insurers may, but are not required to, offer monthly payment plans. Insurers issuing such policies must submit their premium payment plan option to the office for approval before use.**" (Emphasis added).
22. §4,CS for HB 853, Eng. 1 (2009).
23. Section 627.4137(1), Fla. Stat. imposes a 30 day deadline for insurers to provide disclosure statements regarding liability coverage. Amendments to disclosure statements must be provided to claimants immediately upon discovery of facts warranting amendment. *See* §627.4137(2), Fla. Stat.
24. *Id.*
25. §627.428, Fla. Stat. states in pertinent part: "(1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had. (2) As to suits based on claims arising under life insurance policies or annuity contracts, no such attorney's fee shall be allowed if such suit was commenced prior to expiration of 60 days after proof of the claim was duly filed with the insurer. (3) When so awarded, compensation or fees of the attorney shall be included in the judgment or decree rendered in the case."
26. Unlike section 627.428(2), Fla. Stat., newly created section 626.9373, Fla. Stat. does not refer to suits based on life insurance or annuity contract claims. Sections 626.9201(1), 626.927(1), and 626.929(2), Fla. Stats., refer only to property, casualty or marine insurance. Furthermore, section 626.939, Fla. Stat. regarding records produced upon order by the Office of Insurance Regulation does not apply to life insurers.
27. §6, CS for HB 853, Eng. 1 (2009).
28. §626.9374, Fla. Stat. requires the following disclosure language bolded in at least 14 point size font when applicable: **THIS POLICY CONTAINS A SEPARATE DEDUCTIBLE FOR HURRICANE OR WIND LOSSES, WHICH MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU.***THIS POLICY CONTAINS A CO-PAY PROVISION THAT MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU.**
29. §627.701(4)(a), Fla. Stat. states in pertinent part: "(4)(a) Any policy that contains a separate hurricane deductible must on its face include in boldfaced type no smaller than 18 points the following statement: 'THIS POLICY CONTAINS A SEPARATE DEDUCTIBLE FOR HURRICANE LOSSES, WHICH MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU.'" A policy containing a coinsurance provision applicable to hurricane losses must on its face include in boldfaced type no smaller than 18 points the following statement: 'THIS POLICY CONTAINS A CO-PAY PROVISION THAT MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU.'
30. In 1993, section 627.701, Fla. Stat. referred only to "windstorm deductibles" and "wind losses." *See* §13, Chapter 93-410, Laws of Florida. Over time, references to "hurricane" were added and "wind" and "windstorm" deleted. *See* §12, Chapter 96-194; §11, Chapter 97-55; §12, Chapter 2005-111, Laws of Florida.

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Furthermore, language concerning transition from wind deductibles to higher hurricane deductibles was deleted by §12, Chapter 2005-111, Laws of Florida.

31. Office of Insurance Regulation, Informational Memorandum, OIR 08-08M (August 21, 2008), states in pertinent part: "**To Residential Property Insurers in the State of Florida Deductible Applicable to Tropical Storm Fay Claims.**" The purpose of this informational memorandum is to remind property insurers that Tropical Storm Fay has not been declared a hurricane by the National Hurricane Center of the National Weather Service. Tropical Storm Fay is currently classified as a windstorm event that is unrelated to a hurricane. Section 627.4025(2)(a), Florida Statutes, specifically defines "hurricane coverage" as coverage for loss or damage caused by the peril of windstorm during a hurricane. Insurers are hereby notified that hurricane deductibles shall not apply to property losses associated with a Tropical Storm Fay claim. All insurers must apply the deductible that is unrelated to hurricane, generally referred to as the "all other perils deductible" or "other than hurricane deductible." An insurer that fails to apply the appropriate deductible is subject to administrative action.